BY E-MAIL June 21, 2002
(Hard copy to follow by post.)

Docket ID No. OEI-10014

U.S. Environmental Protection Agency
401 M Street – Northeast Mall, Room B607
Washington, D.C. 20460

Re: Docket ID No. OEI-10014.

Comments on EPA Draft Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information

To the Docket:

Please file the attached comments in Docket ID No. OEI-10014, which was announced in the Federal Register on April 30, 2002 (67 Fed. Reg. 21234).

Thank you,

Sincerely,

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Enc.

Comments of Professor Mary L. Lyndon on

The EPA Draft Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information

The Data Quality Act (DQA or Act) directs federal agencies to improve the quality of the information they generate in their administrative processes. The Act does not revise or even address the regulatory functions already established by law, but simply directs agencies to improve their management of information. This comment will address the relationship between the DQA directive and the EPA's other statutory mandates and the links between these and the broader legal, economic and social context of the proceeding. While the points I make are general, I believe they may contribute to understanding the sharp divide that exists between two types of comments here. A number of the comments see the EPA's Draft Guidelines as moving in the right direction. However, others are very dissatisfied and want the EPA to issue a more radical and structured set of rules that would require the agency to use only very high quality information. Some of these parties focus entirely on the "plain meaning" of the provisions of the DQA, appearing blind to its elaborate and dynamic context. However, in this proceeding, the context is crucial.

1. Environmental Statutes Determine EPA's Basic Information Functions.

Numerous federal statutes direct the agency to perform tasks aimed at protecting the environment and these tasks determine the EPA's basic responsibilities with respect to information. The tasks set the parameters of the "utility" of environmental data and they also guide EPA as it determines the appropriate level of investment in information quality in any particular context. Pursuant to these statutes, the agency must address an enormous range of technical issues and, in each area, information is dynamic and generally incomplete. EPA must regulate in the absence of full information. Indeed, this has been the agency's primary challenge: to screen and assess uneven information for its quality and usefulness in carrying out Congress' directives. Congress and the courts have repeatedly upheld EPA's discretion to make hard choices based on limited information. Thus, existing environmental law necessarily shapes the EPA's information quality efforts.

2. The EPA Fosters the Development of Important Environmental Knowledge.

Many of the comments do not acknowledge the important role the EPA plays in the development of environmental knowledge. The basic predicament in environmental regulation – the lack of adequate data – is an artifact of the law's current burden of proof arrangement. Stopping pollution is in large part left to the public and its representative, the EPA; they must take the initiative to gather and interpret data about pollution and prove causal links that are notoriously knowledge-intensive. Traditionally polluters have had little obligation to study and improve their environmental performance. While these incentive structures may be gradually changing, for the most part, regulation is dependent on the efforts of the EPA. Perhaps it makes sense to see this as a tradeoff: a favorable

burden of proof for the regulated industries, balanced by a robust public agency engaged in research and education on the environment. The EPA serves as a resource for a crucial learning process. Distribution of data is essential to this role. Indeed, it is axiomatic that dissemination of data will improve our imperfect environmental knowledge.

The EPA's "data clearinghouse" function is becoming more important as environmental information and knowledge systems are internationalized in the global economy. U.S. leadership in the use of "information strategies" in environmental control has been recognized; other nations and international organizations are emulating the U.S. approach. The EPA web site's popularity itself is independent testimony of the usefulness of environmental data dissemination.

Some comments see the influence of EPA as negative. Of course, EPA is not always right, but there is a need for this kind of information leadership and the limitations of the job do not support curtailing its communications about environmental risks or certainty before it speaks. To a certain extent, some problems are unavoidable. For example, the comments filed by the Center for Effective Environmental Information (CEEI) cite the effect on the market of the EPA's efforts to ban asbestos. The reviewing court found the EPA record incomplete, but the market responded by moving away from asbestos products. Among the court's concerns was the dearth of information about the effects of asbestos substitutes. The market applied a different standard from the judge, but surely this cannot be seen as a "harm" caused by agency information.

3. DQA Implementation Must Be Rooted in Basic Law and Economic Principles.

Economists and legal scholars alike have welcomed increased use of data dissemination as a "market-friendly" means of improving environmental performance; the distribution of this data is necessary to the efficient functioning of the market. Regulation by information also works because it is consistent with market principles and with basic democratic values. Our tradition of access to government and court records and our commitment to speech rights articulate the idea that government should facilitate the flow of speech and information, without influencing its content. The DQA can be read as being within this mainstream, as long as it is implemented with care. The Act should support agency processes, without stifling agency communication. The OMB's final guidelines have made some useful clarifications in this regard. Rather than defining "objectivity" according to content, the guidelines stress that sound research and statistical methods and increased transparency will achieve this goal. 67 Federal Register 8452, 8459-60 (2002). This process-oriented approach will facilitate learning and debate and is consistent with the broader legal setting of the DQA.

4. The Guidelines Must Give Priority to Information Access .

Of course, one goal of the DQA is to improve data accuracy . This is important to the system as a whole and it is important to individuals and firms when particular inaccurate information affects them. However, the concept "harm" should not be mobilized too easily. Agencies must be careful not to inadvertently incorporate into their regulations the notions of harm developed in the context of the common law of defamation. Indeed, "harm" is a thicket of inconsistent principles in the common law and agencies have no guidance on this from Congress.

The problem of imperfect information – incomplete, stale or false – is a fact of life and is treated in a variety of legal contexts, from fraud and defamation to securities regulation. The OMB's statement accompanying it proposed guidelines expressed concern that harm from poor quality data released on the internet may be greater that that stemming from traditional media. This may be true or it may not be. Individual cases of inaccurate data dissemination need to be corrected -- and prevented -- as well as possible within the system's cost and access constraints. However, many interests rely on the dissemination of environmental information to function properly; these interests include regulated industries. Tightening "choke points" on information flow will also cause harm.

5. The DQA's Aim is to Improve Data Quality, Not End Uncertainty.

The problem of how to decide what is true and what is false is present in any legal setting, but it also is separable from the "quality of information" issue. When the law requires factual accuracy, that is, when it affirmatively imposes the requirement that certain facts be proven true before a particular legal result attaches, such as a regulatory requirement or payment of civil damages, it has established procedures for doing so. For EPA, these processes are specified in its authorizing statutes and in the Administrative Procedure Act.

Improving data quality does not require that we engage in an extension of the "good science" from "bad science" debate or that the EPA adopt a firm regulatory definition of "scientific knowledge." The Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), has spawned a great deal of costly

litigation and a wide range of judicial interpretations of the proper test for "science." Time will tell whether Chief Justice Rehnquist (joined by Justice Stevens) was right in hesitating to articulate a role for judges as evidentiary gatekeepers, based on their judgment of evidence as "scientific" or not. The *Daubert* experiment is still going on, but the case has given us one lesson: legally defining a very broad category of knowledge – "science" or "fact" – will surely lead to protracted disputes and costly litigation.

Some of the comments in this proceeding exhort the EPA to espouse a blanket definition of acceptable information, perhaps by issuing a rule to clarify in advance what will be accepted as "fact." Some urge the EPA vow that it will use only the data quality standards embodied in the Safe Drinking Water Act. On its face, these requests seem hard to dispute. Why should anyone accept less than the best? The implication is that failure to espouse such a standard means that EPA is not serious about its tasks, but this is hardly more than browbeating.

When the DQA and the goal of high quality environmental information are put in context, then the choice is not between the lofty and the low. Instead, it is a question of what costs are to be incurred and who will pay for them. Most comments urging rigorous standards are silent on this dimension.

The OMB Guidelines and the EPA Draft Guidelines both reflect the reality that information quality is context-dependent and costly. Short of shifting the burden of proof on pollution, to require high quality evidence of low risk before allowing pollution, improved information practices will come gradually. Each regulatory setting will require judgment concerning the appropriate method of maximizing information quality in the particular context. There is no simple recipe for achieving "truth" or even "accuracy."

Conclusion

Congress could not have intended that the DQA substantially change the government's use of the Internet or that it cause agencies to cut back on exchange with the public. Improved agency processes will come with more regulatory transparency, more financial support for information management and research and more balance in regulatory burdens of proof. American legal institutions have given a high priority to supporting communication without distorting its content and the EPA should be guided by this precedent.